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No. 89-1088

In The

Supreme Court of the United States

October Term, 1989

HELENA MARINE SERVICE, INC.
AND
NEW YORK MARINE MANAGERS, INC.,

Petitioners,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY
AND
UNITED STATES FIRE INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the appellate opinion correctly identifies the threshold question raised in this case with respect to the issue of insurance coverage and whether a financial institution, which owns barges as part of a financing arrangement with a chartering marine service, operates these barges in its business.

LIST OF PARTIES

Petitioners are Helena Marine Service, Inc., and New York Marine Managers, Inc.

Respondents are St. Paul Fire & Marine Insurance Company and United States Fire Insurance Company.*

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*United States Fire Insurance Company in affiliated with The North River Company, Westchester Fire Insurance Company and International Insurance Company, all of which comprise Crum & Forster Commercial Insurance, a XEROX Financial Services Organization.

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RULES:

Supreme Court Rule 17 4

STATEMENT OF THE CASE

For its statement of facts material to consideration of the questions presented in the petition and the reply, respondent United States Fire Insurance Company adopts the statement of facts set forth in the opinion of the Eighth Circuit attached to the petition as Appendix B.

REASONS FOR DENYING WRIT

The Eighth Circuit's opinion reversing the District Court's decision centered on the issue of whether Helena Marine was a covered party under Union National Bank's comprehensive general liability insurance policies. The Court of Appeals isolated the provision of the policies through which the District Court had found coverage and found the threshold question to be whether the bank operated barges in its business. The Court treated the issue of "the meaning of operate in the context that the phrase reaches us" as one of first impression. Upon consideration of the applicable law and facts, the Eighth Circuit determined that the bank did not operate the barges and that Helena Marine was not covered by the insurance policies.

The argument offered in favor of review on writ of certiorari bears no relation to the opinion from which review is sought. Petitioners' argument ignores the careful analysis offered by the Court of Appeals in support of its decision, misstates the approach by which the Eighth Circuit construed the insurance policy at issue and generally disparages the Court of Appeals for the Eighth Circuit.

Allegations such as those leveled against the Eighth Circuit demand substantiation, but petitioners offer none. A review of the appellate opinion provides the simple explanation for this deficiency – the allegations are baseless and untrue. Petitioners contend "the terms of the insurance contracts which constitute the context in which the provision in question must be construed" were not considered, and boldly charge that, through this omission, the Court of Appeals "arbitrarily and improperly rewrote" the contract. These assertions reflect a shocking disregard of the rationale specifically contained in the Eighth Circuit's opinion, rationale which clearly contradicts the contentions now being espoused by petitioners.

Petitioners' cited cases support fundamental principles of contract law with which neither the respondents nor the Court of Appeals would argue. However, they are not helpful to petitioners in this case. In an effort to create an issue, petitioners make the unsupported claim that these fundamental principles were breached by the Eighth Circuit's decision. Although this concocted petition may demonstrate success in meeting the Court's goal that the "fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted," *Mesarosh v. United States*, 352 U.S. 1, 14, 1 L.Ed.2d 1, 77 S.Ct. 1 (1956), the urging of such a fabricated position as a basis for review is an affront to the Eighth Circuit and is unworthy of consideration by this Court.

The contract at issue, a comprehensive general liability insurance policy issued to Union National Bank, contained a provision by which coverage was extended to

specified other parties. That provision was the key to this case and was expressly set forth in the opinion. *St. Paul Fire & Marine Ins. Co. v. Helena Marine Service*, 884 F.2d 391, 392 (8th Cir. 1989). Since the critical element for extending coverage to Helena Marine was a determination of whether Union operated mobile equipment in its business, the court concentrated on this crucial question. It concluded:

> As there are no disputed facts concerning the extent of Union's involvement in the operation of the barges, this inquiry is strictly an issue of law . . . the issue appears to be one of first impression.
>
> We find that Union did not operate barges in its business as that phrase is used in the insurance contract. The record establishes that Helena and Union had basically entered into a financing arrangement whereby Union financed the barges on behalf of Helena with Helena operating the barges. Union merely owned the barges. Owned does not equal operate. (citations omitted). Thus, we find that to give the phrase "operate in your business" a meaning that can be met merely through ownership would be to stretch the term well beyond its accepted meaning.

Id. at 393.

Despite petitioners' dour prophecy regarding the effect of this decision, it is absurd to suggest that it could lead to any erosion of the integrity of insurance contracts. To the contrary, the "serious and far reaching implications" of which petitioners profess concern would result only if petitioners' position were accepted. As the Court of Appeals noted, "Indeed, appellee's construction would

apparently result in a bank being deemed to operate any business or vehicle it finances if it retains title in the financing arrangement." *St. Paul Fire & Marine Ins. Co. v. Helena Marine Services* at 394.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup.Ct.R. 17. Petitioners offer no legitimate basis to call this decision into review. The Court of Appeals for the Eighth Circuit properly considered, analyzed and decided the case on its merits. That petitioners' spurious claim was rejected is an inadequate reason for review.

CONCLUSION

The question which petitioners raise in this matter is mythical, but even if it presented a substantive issue it would not rise to the level required to invoke the consideration of this Court. The Eighth Circuit applied the correct standard of review to decide as a matter of law that Union National Bank did not operate barges in its business and, therefore, Helena Marine Services, Inc. was not an insured under its comprehensive general liability insurance policy.

Accordingly, respondent, United States Fire Insurance Company, respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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